# Public Prosecutor v Foo Ing Hwa

HIGH COURT (MUAR) — CRIMINAL TRIAL NO 45–19 OF 2004
AHMADI ASNAWI JC
9 JANUARY 2009

*Criminal Law — Murder — Causation — Whether death of deceased occasioned by injuries suffered — Whether injuries and subsequent death caused by act of accused — Whether intention of accused relevant — Whether prima facie case against accused established — Whether murder within ambit of s 300(c) of the Penal Code*

The deceased was the mother-in-law of one See Tin @ See Siew Tin's ('PW8') who stayed with PW8 and her husband in a sundry shop. The deceased spent most of her time resting in the middle portion of the sundry shop. On the day of the incident the PW8 testified that the accused had entered the shop armed with a piece of wood and assaulted PW8 and robbed her. The accused also, struck the deceased on her head, who was sitting on a reclining chair, which resulted in her death. The investigation officer confirmed that the deceased had died when he arrived at the scene of the crime. The post mortem on the deceased stated that the deceased died due to injuries inflicted upon her head. When the accused was later apprehended, a bracelet and two rings belonging to the deceased were found from inside the trousers pocket of the accused and iron clippers used by PW8 were also recovered from the car driven by the accused. However, the accused denied that the bracelet and the two rings were recovered from him and he also denied having the iron clippers recovered from the car driven by him. The accused was identified from identification parade by PW8 and other witnesses. Subsequently, the prosecution established a prima facie case against the accused. The accused alleged that when he entered the sundry shop he saw the deceased stood up, groped around, shook her head repeatedly and fell down hitting a cross beam in the shop which had caused her death. The accused alleged that he also saw the deceased was wearing thick spectacles which were never found from the crime scene. The prosecution argued that the defence of the accused was a defence of bare denial. The accused had failed to challenge, inter alia; the evidence that the general health condition of the deceased was good, that PW8 was assaulted using a piece of wood, the identification of the bracelet and the two rings by PW8 belonging to the deceased and were worn by the deceased, the recovery of the bracelet and the two rings from inside the trousers pocket of the accused at the time of his arrest.

**Held**, convicting and sentencing the accused to death:

(1) The recovery of items belonging to the deceased and PW8 which was positively identified by PW8 provides the nexus that the accused did in fact went to the sundry shop. It also provided a very compelling corroborative evidence of PW8's testimony relating to the events leading to the death of the deceased (see paras 24–25).

(2) The post mortem on the deceased showed that the head injuries suffered by the deceased caused her death. The intention of the accused whether to cause death or otherwise was immaterial. Once it had been established that the accused intended the injuries, it was sufficient in the ordinary course of nature to cause death hence the act of the accused was murder within the ambit of s 300(c) of the Penal Code. It did not matter that there was no knowledge that an act of that kind committed by the accused would likely cause death (see paras 40–41 & 79).

(3) The claim by the accused that the deceased was wearing very thick spectacles was merely a creation of the accused in an attempt to lend credence to his testimony that the deceased stood up and was groping around like a blind person in an attempt by the accused to show how weak and feeble the deceased was, to run in tandem with her fall, contrary to the facts deposed by PW8 (see para 58).

(4) PW8's testimony that the accused hit her using a piece of wood was not challenged nor was she cross-examined by the defence. The failure of the defence to do so went to the credibility of PW8's testimony ie the fact that she was hit by the accused by a piece of wood remains unshaken (see para 61).

(5) There was direct evidence which was sufficient enough to determine the time or probable time of death of the deceased. The time of death of the deceased given and adduced in evidence was consistent with the testimony of PW8 and consistent with the duration of the accused's presence in the shop and the time he delivered the blows upon the deceased's head. It was a non-issue altogether. There were eye-witnesses who were able to give the estimated/probable time of death of the deceased (see para 85).

**[Bahasa Malaysia summary**

Si mati adalah ibu mertua See Tin @ See Siew Tin ('PW8') yang tinggal bersama PW8 dan suaminya dalam sebuah kedai runcit. Si mati banyak menghabiskan masanya berehat di bahagian tengah kedai runcit tersebut. PW8 memberikan keterangan bahawa pada hari kejadian tersebut tertuduh telah memasuki kedai itu bersenjatakan sebatang kayu dan menyerang PW8 dan merompaknya. Tertuduh juga, menghentak si mati di kepalanya, yang

A sedang duduk di sebuah kerusi malas, yang mengakibatkan kematiannya. Pegawai penyiasat mengesahkan bahawa si mati telah meninggal dunia apabila dia tiba di tempat kejadian jenayah itu. Bedah siasat yang dilakukan ke atas si mati mengesahkan bahawa si mati meninggal dunia akibat kecederaan ke atas kepalanya. Apabila tertuduh ditangkap, seutas gelang
B tangan dan dua bentuk cincin kepunyaan si mati telah ditemui daripada poket seluar tertuduh dan klip besi yang digunakan oleh PW8 juga dijumpai di dalam kereta yang dipandu oleh tertuduh. Bagaimanapun, tertuduh menafikan gelang tangan dan dua bentuk cincin dijumpai padanya dan dia
C juga menafikan klip besi yand dijumpai di dalam kereta yang dipandu olehnya. Tertuduh telah dikenalpasti daripada perbarisan cam oleh PW8 dan saksi-saksi lain. Kemudiannya, pendakwaan berjaya membuktikan satu kes prima facie terhadap tertuduh. Tertuduh mengatakan bahawa apabila dia memasuki kedai runcit tersebut dia melihat si mati berdiri, meraba-raba
D mencari sesuatu, menggoncangkan kepalanya berulang kali dan terjatuh menghentak rasuk bersilangan dalam kedai yang telah menyebabkan kematiannya. Tertuduh mendakwa yang dia juga melihat si mati memakai cermin mata yang amat tebal yang tidak ditemui daripada tempat jenayah. Pendakwaan menghujahkan bahawa pembelaan tertuduh adalah satu
E penafian kosong. Tertuduh gagal mencabar, antara lain, bukti bahawa keadaan kesihatan si mati secara umumnya adalah baik, bahawa PW8 telah diserang menggunakan sebatang kayu, pengenalpastian gelang tangan dan dua bentuk cincin kepunyaan si mati oleh PW8 dan ianya telah dipakai oleh si mati, penemuan gelang tangan dan dua bentuk cincin daripada poket
F seluar tertuduh pada masa penangkapannya.

**Diputuskan**, mensabit dan menghukum tertuduh dengan hukuman mati:

G (1) Penemuan barang-barang kepunyaan si mati dan PW8 yang telah dikenal pasti secara positif oleh PW8 memberikan kaitan bahawa yang tertuduh sebenarnya telah pergi ke kedai runcit tersebut. Ia juga memberikan satu keterangan menyokong yang kuat terhadap keterangan PW8 berkaitan dengan peristiwa-peristiwa yang membawa
H kepada kematian si mati (lihat perenggan 24–25).

(2) Bedah siasat ke atas si mati menunjukkan yang kecederaan kepala yang dialami si mati telah menyebabkan kematiannya. Niat tertuduh sama ada untuk mengakibatkan kematian atau sebaliknya tidak penting.
I Sebaik sahaja dibuktikan yang tertuduh berniat untuk melakukan kecederaan tersebut, adalah mencukupi secara semulajadinya untuk mengakibatkan kematian, justeru perbuatan tertuduh adalah membunuh di bawah s 300(c) Kanun Keseksaan. Adalah tidak penting bahawa tertuduh tidak tahu bahawa tindakan sebegitu rupa yang

dilakukan oleh tertuduh berkemungkinan akan mengakibatkan kematian (lihat perenggan 40–41 & 79).

(3) Dakwaan tertuduh bahawa si mati memakai cermin mata yang amat tebal adalah cuma satu rekaan tertuduh dalam percubaannya untuk menguatkan kepercayaan terhadap keterangannya bahawa si mati berdiri dan meraba-raba seperti seorang buta dalam percubaan tertuduh untuk menunjukkan bahawa si mati lemah dan tidak bertenaga, untuk digunakan seiring dengan jatuhnya si mati, bertentangan dengan fakta-fakta yang dideposkan oleh PW8 (lihat perenggan 58).

(4) Keterangan PW8 bahawa tertuduh memukulnya menggunakan sebatang kayu tidak dicabar dan juga tidak disoal balas oleh pihak pembela. Kegagalan pihak pembela berbuat demikian memberi kesan kepada kredibiliti keterangan PW8, iaitu fakta yang dia dipukul oleh tertuduh dengan sebatang kayu kekal teguh (lihat perenggan 61).

(5) Terdapat bukti langsung yang mencukupi untuk menentukan masa atau masa kemungkinan kematian si mati. Masa kematian si mati yang diberikan dan dikemukakan sebagai bukti adalah konsisten dengan keterangan PW8 dan konsisten dengan tempoh masa kehadiran tertuduh dalam kedai dan masa dia memukul kepala si mati. Masa sama sekali tidak menjadi satu isu. Terdapat saksi-saksi yang boleh memberi anggaran/kemungkinan masa kematian si mati (lihat perenggan 85).]

**Notes**

For a case on causation, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1155.

**Cases referred to**

*Alcontara a/l Ambrose Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
*Bala anak Matik v PP* [2006] 3 MLJ 516; [2006] 1 LNS 8, CA (refd)
*Pendakwa Raya v Kong Yik Lin* [2005] 5 AMR 606 (distd)
*PP v Abdul Razak bin Dalek* [2007] 2 MLJ 255; [2006] 4 CLJ 2009, HC (refd)
*PP v Lee Poh Chye & Anor* [1997] 4 MLJ 578, HC (refd)
*PP v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 1 CLJ 285 (Rep), SC (refd)
*PP v Ling Tee Huah* [1982] 2 MLJ 324, HC (refd)
*PP v Visuvanathan* [1978] 1 MLJ 159, HC (refd)
*Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)

**Legislation referred to**

Penal Code ss 300, 300(a), (b), (c), (d), 302
Penal Code [SG] s 300(c)

*Manian K Marappan (Manian K Marappan & Co) for the accused.*

*Haslinda bt Abu Bakar (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

**Ahmadi Asnawi JC:**

**[1]** Here is the charge against the accused, Foo Ing Hwa:

> Bahawa kamu pada 23.02.2004 jam lebih kurang 11.20 pagi hingga 11.40 pagi, di sebuah kedai runcit di Batu 18, Parit Kangkar, Jalan Batu Pahat/Ayer Hitam, di dalam Daerah Batu Pahat, di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan bunuh dengan menyebabkan kematian LIM TOH ENG (K/P: No. 270215-01-5016) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

**[2]** The facts of the case in brief are enumerated below.

**[3]** PW8, See Tin @ See Siew Tin, assisted her husband, one Teo Ah Hoo in running and managing their sundry shop, the scene of the crime, located at the address stipulated in the charge. The said double storey sundry shop was also their residence. The deceased, Lim Toh Eng, was PW8's mother-in-law. She stayed and lived with the couple at the same premises. The sundry shop could be divided into three parts. The front part is where they run their sundry/retail business ('the business area'). The living room occupied the middle portion. This was the area where the deceased slept and where she spent most of her time, resting on a reclining chair. The rear portion accommodates the kitchen, the bathroom and the toilet.

**[4]** On 23 February 2004, at about 11.15am the accused came to the sundry shop. He came by car, a red Perodua Kembara car bearing registration No AEW 5983 ('the Kembara car'). He parked the Kembara car in front of the sundry shop. He alighted from the car and entered the shop. PW8 was in the shop. The deceased was resting on a reclining chair in the living room. The accused then ordered a packet drink from PW8. He then asked PW8 whether she was alone in running the shop. She answered no and proceeded to say that her husband was out, running an errand for a certain customer. The accused then asked PW8's permission to used the toilet. She told him to go outside the shop and do his things under the big tree behind the shop. Upon the accused repeated appeals, PW8 relented and allowed the accused to use the toilet located inside the shop after tying up her dog inside the bathroom. The dog was originally tied beside the bathroom.

**[5]** To go to the toilet, the accused need to pass through the living room where the deceased was resting. A short while after using the toilet, the

accused emerged from the toilet. He went back to the business area and continued drinking his packet drink. While drinking he appeared to have scanned the shop.

**[6]** After finishing his drink, the accused went outside the shop to his car. When he returned to the shop, PW8 saw him carrying a piece of wood about 2 to 2½ feet long, much like the one exhibited in court, marked P20 but a bit less thicker. The accused approached PW8 armed with the piece of wood. Becoming very frightened, PW8 moved to the rear of the business area.

**[7]** The accused then struck her head with the wood. She avoided the blow and the blow landed on her rear left shoulder. She heard the accused shouting 'hendak rompak' and demanded where her money was. She told the accused that the money was in the drawers of the counter. The accused then asked where she kept her jewelleries. She said she had none.

**[8]** The deceased who was then resting/sitting on the reclining chair in the living room enquired what happened. The accused then turned his attention towards her. He went to her and struck the deceased on her head with the same piece of wood for no rhyme or reason. According to PW8 she was then sitting in a reclining position on the reclining chair and upon being hit on her head, she slided and fell down from the reclining chair and ended lying down on the floor as is shown in the photographs marked exhs P22 (4), (5) and (6).

**[9]** The accused then ransacked the drawers of the counter. There were about RM200 to RM300 in the drawers. PW8 saw the accused scooping the money. Thereafter the accused went after the drawers in the living room.

**[10]** At this juncture, PW8 ran out of her shop and dashed across the road in front of her shop. She stopped a passing car driven by PW6's (Mohd Isa bin Koming) friend, one Abdul Latif. PW6 was seated next to the driver. She explained to PW6 what happened. PW6 turned towards the shop and saw the accused coming out of the shop throwing a certain object on the ground. He next saw the accused entering into the Kembara car and speeded towards Batu Pahat town. Abdul Latif made a u-turn and gave chase. Along the way PW6 telephoned his boss PW7, who happened to be somewhere along the same road to also go after the Kembara car. PW7 with another worker also gave chase. Brave fellows indeed!

**[11]** Meanwhile PW8 went back to her shop. She found the deceased lying on the floor with a bloodied head. She was motionless. PW8 tried to wake her up. There was no response. She found her to be pretty dead. She did not touch the body except to wipe off the blood from the deceased's face. She called the police. The investigating officer, PW12 (DSP Mohd Shahar bin

Abdul Aziz) arrived at the scene of the crime at about 1pm. He also found her dead. He took the deceased body to Batu Pahat Hospital for a post mortem. The post mortem was conducted by PW14 (Dr Shahidan bin Mohd Noor) on 25 February 2004, two days after the expiry of the deceased. He confirmed that the deceased succumbed to her death due to head injuries.

**[12]** In this case, on a charge under s 302 of the Penal Code the prosecution carried the arduous task of proving:

(a) that the deceased, Lim Toh Eng had died;

(b) that the deceased died due to the injuries sustained by her;

(c) that the death of the deceased was occasioned by the act or conduct of the accused;

(d) that the act by which the accused caused such death was done —

(i) with the intention of causing death; or

(ii) with the intention of causing bodily injury as the accused knew to be likely to cause the death of the person whom the harm was cause; or

(iii) with the intention of causing bodily injury to the person, and the injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death; or

(iv) with the knowledge that the act was so imminently dangerous that it must in all probability cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

THE DEATH OF THE DECEASED, LIM TOH ENG

**[13]** It is my findings that there is no dispute as regards to the death of the deceased. The deceased was PW8's mother in law. She saw the deceased sliding down from the reclining chair and fell flat on the floor after being hit on her head by the accused. She identified the deceased to the investigating officer, PW12. She also identified the deceased before the post mortem was conducted at Batu Pahat Hospital. PW14 who conducted the post mortem on 25 February 2004 confirmed that the deceased died due to the head injuries suffered by her. Equally PW12 confirmed that the deceased was already dead when he arrived at the scene at about 1pm on 23 February 2004.

WHETHER THE DEATH OF THE DECEASED WAS OCCASIONED BY THE INJURIES SUFFERED BY HER

**[14]** PW14's external examination of the deceased revealed that the deceased suffered a single mark of trauma in the form of an inverted V-shaped laceration with each limb measuring 3.5 x 0.5cm on the left forehead, located some 5cm above the middle of the left eye-brow. This laceration exposed the skull bone underneath. There were no other external injuries on the person of the deceased apart from an old 10cm midline vertical surgical scar from the navel to the supra pubic area.

**[15]** PW14's internal examination of the head of the deceased as indicated in his post mortem report (exh P38) revealed that '… the scalp when reflected showed minimal bruising around the laceration described with subgaleal haemotoma 10 x 8cm behind the left ear. The skull and back was intact. The brain coverings were intact and unremarkable. The brain (1,300g) showed focal thick subarachnoid haemorrhages of the left temporal region which centred about central sulcus, right temporal, base of the brain and cerebellum. The cerebrospinal fluid was blood-stained. The vessels at the base of the brain were intact and patent …'. He concluded his report by saying '… there were areas of subarachnoid haemorrhages on the brain surfaces and the brain injured. The cause of death was given as due to head injury …'.

**[16]** In this testimony in court (at p 83 of the notes of evidence) PW14 elaborated on his findings further:

> Pendarahan subarachnoid bermakna pendarahan di atas permukaan otak. Pendarahan ini boleh menyebabkan kematian. Otaknya juga luka kerana otak bergerak sebab rongga subarachnoid adalah satu rongga yang terdapat saluran di mana jika ada pergerakan yang kuat yang menyebabkan otak bergerak salur-salur darah ini akan putus dan menyebabkan pendarahan di kawasan tersebut. Ini boleh menyebabkan kematian. Ini berlaku kepada si mati. Berdasarkan fakta kes dan penemuan semasa post mortem saya berpendapat si mati mati kerana kecederaan pada bahagian otak. Ini yang saya maksudkan dengan — 'cause of death due to head injury'.

**[17]** PW14's examination of the mouth, throat, neck structures and abdomen did not reveal any abnormality or injury. Upon examination of the chest, he found the lungs to be congested (right 350g and left 300g). However PW14 eliminated these congestions as the cause of the deceased's death. It was more of a complication resulting from the injuries to the brain. It occurred at or about the time when death ensues or after death had taken place.

**[18]** PW14's findings were sound and his explanation cogent. His testimony remains uncontroverted. I have no reason to disagree with him in terms of the cause of death of the deceased. I have thus no hesitation in accepting his testimony and hence it is my factual findings that the deceased died because of the injuries inflicted upon her head.

WHETHER THE INJURIES SUFFERED BY AND SUBSEQUENT DEATH OF THE DECEASED WAS OCCASIONED BY THE ACT OF THE ACCUSED

**[19]** It was the testimony of PW8 that it was the accused alone who came into her shop and hit the deceased on her head, causing her to collapse on the floor. Her evidence as indicated at p 35 of the notes of evidence is most relevant and crystal clear:

> Bila saya nampak OKT bawa kayu masuk ke kedai saya rasa amat takut dan berundur ke belakang ruang niaga. Bila OKT menghampiri saya, dia menghayunkan kayu ke arah kepala saya untuk memukul saya. Saya elak dan hayunan kayu itu terkena bahu kiri belakang saya. Saya tidak dapat rasa apa-apa kerana terlalu takut dan dengar dia kata dia nak rompak. OKT tanya saya duit di mana. Saya beritahu duit dalam laci. Dia tanya samada saya ada barang kemas dan dimana saya simpan. Saya beritahu saya tidak ada barang kemas. Dia pusing ke belakang dan ibu mertua saya duduk berhampiran dengan saya dan terus menghayunkan kayu tersebut ke arah kepala ibu mertua saya dengan kuat. Pada ketika dipukul, ibu mertua sedang duduk dikerusi malas. Sebelum kena pukul ibu mertua ada tanya saya apa hal. Lepas cakap macam itu OKT terus pukul ibu mertua. Tidak nampak berapa kali OKT pukul ibu saya kerana saya dalam keadaan panik. Tapi darah mengalir dari kepala ibu mertua saya.
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> Lepas kena pukul ibu mertua jatuh mengiring dari kerusi malas lalu terbaring di atas lantai — seperti dalam gambar P22 (4), (5), (6) dan (7). Keadaan lepas jatuh lebih kurang seperti dalam gambar-gambar ini. Lepas ibu mertua jatuh, saya nampak OKT menggeledah laci di kaunter ruang niaga; lepas itu laci-laci di ruang ibu mertua tidur. Dalam kaunter ada duit — kira-kira 200 ke 300. Saya nampak OKT ambil wang daripada laci di kaunter. OKT geledah semua benda yang ada dalam laci tempat tidur ibu mertua. Bila saya nampak OKT mengeledah laci di ruang tidur ibu mertua, saya lari keluar kedai dan pergi ke jalanraya minta bantuan.

**[20]** PW8's evidence that the deceased was hit by the accused with a piece of wood on her head was fortified by the findings of PW14. He testified that the laceration on the forehead and the injuries at the back of the ear suggested that a blunt trauma force was inflicted/applied upon the area. He opined that the said injuries were consistent with injuries inflicted by the usage of either one of the two pieces of wood (exhs 20A and P21A) shown to him or other pieces of wood having the same weight, length, shape and edges. Now, it was

the testimony of PW8 that the piece of wood brought and used by the accused to hit her and the deceased were about the same length with exh P20A but a bit less thicker. It is immaterial that the actual piece of wood used in the commission of the crime was not recovered by the police in the light of PW14's testimony that the injuries sustained were consistent with that caused by a piece of wood.

**[21]** PW14 also testified that the force applied to cause the injuries he found on the deceased was considerable. As indicated at p 84 of the note of evidence, he said '… daya yang digunakan adalah agak kuat di mana daya itu telah ditransmit kepada otak kemudiannya. Daya dikenakan kepada bahagian dahi dan kemudian menembusi bahagian otak. Kecederaan ini in konsisten dengan daya dikenakan di bahagian dahi dan kemudiannya mangsa jatuh. Saya berpendapat begitu kerana kecederaan dalaman agak teruk …'. This testimony is consistent with the testimony of PW8 when she said that '… terus menghayunkan kayu tersebut ke arah ibu mertua saya dengan kuat'. It is also consistent with PW8's testimony that upon receiving the blow, the deceased went sliding down and fell on the floor.

**[22]** PW14 excluded the suggestion by learned counsel for the accused that the deceased sustained the head injuries when she fell on her own and in the process her head hit the cross-beam shown in the photographs P22 (4), (5), (6) and (7). It could not have been so because, as the photographs indicated there was no contact between the deceased's head and the cross-beam and that in a normal fall, the outer most part of the head ie the eye-brows or the ridge above the eye-socket would have been in contact with the cross-beam first. In this case it was the forehead that was impacted. He opined that the injuries were trauma injuries and not resultant from a fall. He added that there were at least two impact traumas inflicted to cause such injuries, one at the forehead and the other at a rear left of the head behind the left ear. Additionally PW14 testified that the splattering of blood drops/stains all over the place as shown in the said photographs are further indicators that the deceased did not sustain the head injuries in the manner suggested by learned counsel.

**[23]** I have no issue in accepting PW14's expert opinion in respect of the same. Equally there were no blood marks or stains on the cross-beam itself. Common sense would dictate that if the deceased's head were to hit the cross-beam causing such serious injuries and heavy bleeding, certainly the cross-beam would be equally covered in blood. Though PW14 said that the deceased was hit while in a standing position in contrast to PW8's testimony, I find the contradiction to be immaterial. It does not in anyway erode the

A crux of PW14's testimony that the injuries sustained by the deceased were not due to a fall but were trauma injuries caused by intentional blows on the head.

B **[24]** The recovery of certain items belonging to the deceased and the sundry shop from the accused upon his arrest further fortified PW8's testimony that the accused indeed came to her shop to commit robbery. The accused was arrested by PW9 in a *kebun kelapa sawit* on the left side of KM 80, PLUS Highway, facing Johor Bahru. This was where the accused C abandoned his Kembara car and fled on foot into the kebun kelapa sawit, adjacent to the Highway. PW9 testified that he recovered from the person of the deceased, amongst others, one piece of bracelet — exh P6DA, two rings — exhs P6DB (1 and 2), a sum of RM117 in various denominations — exhs P6AA (1 to 22, P6 AB (1 to 23) and P6 BA (1 to 10)) and shillings also D in various denominations amounting to RM7.21 cents — exh P6C (A). Meanwhile, the investigating officer, PW12 recovered four iron clippers from the front floor board of the Kembara car — exhs P7 (1 to 4).

E **[25]** PW8 without hesitation identified the bracelet and the two rings as the bracelet and the rings belonging to the deceased and worn by the deceased though its colour had changed. The items used to shine like gold but now carried a copper like colour. PW8 explained that the jewelleries were not made of gold but 'suasa', ie a metal mixture of gold and copper. I have no doubt about the identification of the items by PW8. Hence it could be safely F inferred that the accused robbed the deceased of her belongings after she fell on the floor and after had PW8 fled the scene, for PW8 did not see the accused taking the said belongings from the deceased before she fled the scene. Though PW8 could not identify the monies recovered as the monies taken out of the drawers of the shop's counter as all monies appeared similar, G nevertheless she identified the four iron clippers as the clippers she used to clipped the monies in accordance with its denomination. The recovery and identification of the four iron clippers confirmed PW8's testimony that the monies had been arranged and clipped in accordance with its denomination before it was robbed by the accused. Equally, the recovery of the bracelet, the H two rings and the iron clippers and its identification by PW8 provides the nexus that the accused did in fact come to the said sundry shop. It also offers a very compelling corroborative evidence of PW8's testimony relating to the events leading to the death of the deceased.

I **[26]** In the event I harboured no doubt that the injuries sustained by the deceased was inflicted upon her by the accused by using a piece of wood. The evidence of PW8, PW14 and PW9 banded together consistently indicated the culpability of the accused.

[27] Equally I have no doubt with regard to the identification of the accused. According to PW8 the accused was in her shop for a good 20 minutes from the time he first entered the shop to the time he first left the shop to go back to his Kembara car. There were no other customers except for the accused. The accused ordered his packet drink (exh P9A, the packet drink and exh P9B, the straw) and also asked her permission to use the toilet. The accused also struck a conversation with PW8. PW8 added that the incident wherein the accused reentered the shop armed with a piece of wood to the time she fled the shop after the accused hit her on her left shoulder, hit the deceased on her head, ransacked the drawers of the counter and the drawers in the living room lasted for about 10 minutes. In such event I did not doubt her testimony that she have had a good look at the accused during those times. She could not have been wrong in identifying the accused as the person who hit her and then hit the deceased on her head and thereafter robbed her sundry shop.

[28] PW6 also identified the accused as the person whom he saw coming out of PW8's shop and later throwing something on the ground and later drove off in the Kembara car. He managed to have a good look at the accused during the chase at times when his car and the accused car was abreast and during the times the accused made U-turns here and there. He even saw the accused giving warnings to him by pointing his fingers at him. PW6 gave up the chase when his car ran out of petrol somewhere along the PLUS Highway. PW7 also identified the accused as the person driving the Kembara car he gave chase when he was asked by PW6 to assist him in the chase. He stopped his car about 100 meters behind the accused car when the accused stopped his car at KM 80, PLUS Highway. He and his mate dare not go after the accused on their own. Both PW6 and PW7 also identified the Kembara car shown in the photographs, exhs P23 (1 to 3), as the Kembara car they gave chase and driven by the accused at the material time.

[29] PW13, Inspector Idora bt Omar, conducted the identification parade on the accused. According to her all three witnesses, ie PW8, PW6 and PW7, have no difficulty in identifying the accused. The identity of the accused is thus complete.

[30] For all the reasons given it is my finding of fact that the injuries suffered by the deceased and her subsequent death was occasioned by the act of the accused in hitting her on her head with a piece of wood.

THE INTENTION OF THE ACCUSED

[31] It is next to impossible to gauge one's intention, what more to procure direct evidence to prove one's intention. Rather, intention is a matter for the

court to infer from the act or conduct of the person in a given set of fact or circumstances before, during or after the occurrence of the particular event or incident. However, on a charge under s 302 of the Penal Code, the imperative of the prosecution is to prove that the act of the accused in inflicting the injuries sustained by the deceased leading to her eventual demise comes within the ambit of any one or a combination thereof, of the situations as envisaged by s 300(a), (b), (c) or (d) of the Penal Code. In my view, upon the facts and evidence adduced the provisions of s 300(c) of the same is most relevant to gauge the conduct and intention of the accused. The relevant provision provides:

> 300 Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) ...
>
> (b) ...
>
> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) ...

**[32]** His Lordship Dato' Jeffrey Tan in *Public Prosecutor v Abdul Razak bin Dalek* [2007] 2 MLJ 255; [2006] 4 CLJ 2009 has dealt extensively on this subject (s 300(c)). I need add no further to what His Lordship has meticulously considered. Thus at para 57:

> In relation to intention under the third clause of s 300, *Ratanlal & Dhirajlal ibid*, at pp 1308–1309 commented as follows:
>
> > This clause [3] views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensures and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapons used, sometimes the part of the body on which injury is caused, and sometimes both are relevant. The determinant factor is intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide not amounting to murder or sometimes less.

In *Rajwant Singh* (AIR 1966 SC 1874 at p 1878) the Supreme Court stated: A

> The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury inflicted is sufficient in the ordinary course of nature to cause death. In this clause, the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender had subjective knowledge of the consequences or not. B

Explaining clause 3 of s 300 Vivian Bose J in the leading case of *Virsa Singh* observed: C

> First, it must establish, quite objectively that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved: These are purely objective investigations; D
>
> Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended;
>
> Once these three elements are proved to be present, the enquiry proceeds further and E
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. F
>
> Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of the kind will be likely to cause death. Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. (Emphasis added.) G H

[58] *Ratanlal & Dhirajlal ibid* at pp 1310–1313 further states as follows:

> This cl [3] states that where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause. The distinction between this cl [3] and cl [2] of s 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the conviction should be of murder; if there I

A was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction should be culpable homicide not amounting to murder.

...

B The emphasis in the clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and C sometimes both are relevant … The nature of the material object used and the force used are useful guides in arriving at a decision as to whether the intention and knowledge required by the section can be attributed to the accused …

… Each case would depend on its own facts and circumstances

D ... Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention. (Emphasis added.)

**[33]** In *Public Prosecutor v Visuvanathan* [1978] 1 MLJ 159, the Singapore E Criminal Court of Appeal, opined as follows on the applicability of s 300(c) of the Singapore Penal Code, which is in pari materia with our own s 300(c):

In our opinion cll (a) and (c) of s 300 are meant to cover different acts, ie acts done with different intentions. The cases show that cl (c) is meant to apply in F circumstances where the assailant had no intention of causing death but has nevertheless intentionally (and not accidentally) inflicted a bodily injury sufficient in the ordinary course of nature to cause death. Under cl (c) once the intention to cause the bodily injury actually found to be present is proved, the rest of the injury ceases to be subjective and becomes purely objective and the only question is G whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict. The crucial question always is, was the injury found to be present intended or accidental. As was observed by Bose J in *Virsa Singh*'s, at p 476:

H It does not matter that there was no intention … to cause injury of a kind that is sufficient to cause death in the ordinary course of nature.

And at p 161:

I … the question, so far as the intention is concerned, is not whether he intended … to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question.

The matter is clarified further by Hidayatullah J in *Rajwant Singh*'s case, at p 1878:

> If the injury the offender intends causing and does cause is sufficient to cause death in the ordinary course of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not...

**[34]** Further down the court ruled:

> In our judgment for the application of cl (c) of s 300 of the Penal Code, all that the prosecution need to prove is:
>
> (1) that the accused did an act which caused the death of the deceased;
>
> (2) that the said act was done with the intention of causing bodily injury;
>
> (3) that the injury caused —
>
> (a) was intended and was not accidental or otherwise unintentional; and
>
> (b) was sufficient in the ordinary course of nature to cause death.
>
> There is no other requirement. In our opinion the submission of counsel for the defence based on Lord Diplock's dictum that 'the prosecution must also prove that the accused intended to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death' was untenable because such a requirement would make cl (c) otiose in view of the provision of cl (a).

**[35]** I have no qualm in accepting the above passages as correct authority of the principles involved in the application of s 300(c) of the Penal Code. Now coming back to the case before me, what kind of intention can be inferred from the act or conduct of the accused? The accused came forthright to the deceased after hitting PW8. He aimed his blow to hit the deceased directly on her head unhesitatingly. He hit the deceased at least twice, once at the forehead and the other, behind the left ear (according to the expert opinion of PW14). He used a piece of wood about 2 to 2½ feet long, only a bit less thicker than exh P20. He aimed his blows at the most vulnerable and exposed part of the human body. By any reckoning the piece of wood is a lethal weapon when wrongly used. PW8 testified that the accused '… terus menghayunkan kayu tersebut ke arah kepala ibu mertua saya dengan kuat …'. Meanwhile PW14 confirmed that the force applied to cause the injuries sustained by the deceased was considerable. At the material time the deceased was merely sitting on the reclining chair, did not quarrel with the accused, did not resist the accused, did not provoke the accused, did not fight with the accused and did not say anything except to enquire from PW8 what was happening. The deceased was an old woman about 77 years old then PW8 was 54. There was no reason at all what so ever to hit the deceased in the

manner aforesaid. In such event I cannot resist the findings that the blows inflicted by the accused upon the deceased was intentional and was committed with the intention of causing bodily injury.

**[36]** I have enumerated elsewhere in the preceding paragraphs the nature of the head injuries suffered by deceased which led to her death. Hence the next issue for determination is whether the accused intended to inflict the injuries in question and that such injuries were sufficient in the ordinary course of nature to cause death. The uncontroverted evidence indicated that the accused applied considerable force to inflict the blows on the deceased's head (see the testimonies of PW8 and PW14). A piece of wood was used to inflict the blows.

**[37]** The force used and the effect of the force applied were, in the words of PW14 (at p 83 of the notes of evidence), reproduced below at the risk of being repetitive:

> Tengkorak si mati tebal didepan dan belakang dan tidak retak. Otak beliau yang beratnya 1300 gm menunjukkan pendarahan subarachnoid yang tebal di bahagian kiri berpusat di bahagian central celcus. Terdapat juga subarachnoid di bahagian temporal kanan di dasar otak dan bahagian cerebellum. Pendarahan subarachnoid bermakna pendarahan di atas permukaan otak.
>
> Otaknya juga luka kerana otak bergerak sebab rongga arachnoid adalah satu rongga yang terdapat saluran dimana jika ada pergerakan yang kuat yang menyebabkan otak bergerak, salur-salur darah ini akan putus dan menyebabkan pendarahan di kawasan tersebut. Ini boleh menyebabkan kematian. Ini berlaku kepada simati.
>
> Berdasarkan fakta kes dan penemuan semasa post mortem saya berpendapat si mati mati kerana kecederaan pada bahagian otak. Ini yang saya maksudkan dengan — cause of death due to head injury. Untuk kecederaan yang seperti ini selalunya akan menyebabkan kematian yang agak cepat sedikit daripada orang yang diserang sakit jantung. Sakit jantung boleh mati dalam 2 ke 3 minit jika tidak dirawat. Bagi kecederaan otak, lebih lama dari tempoh masa itu tapi kematian agak cepat.

**[38]** From the above it is obvious that the target of the blows and the force applied on the targeted area, ie the head of the deceased and the severity of the injuries thereby inflicted suggested that the injuries were very well intended. The accused caused and intended the said injuries. If the intention was only to immobilised the deceased, there is no need to aim and deliver the blows on her head and to use such force to deliver the blows. In fact there is even no need to hurt the deceased at all in view of her age, physical condition and passivity at the material time of the incident.

**[39]** For the accused to inflict such injuries on the most vulnerable part of the human body, he must know that such injuries will be dangerous to life.

It is preposterous to suggest that the accused did not know that the head is the most vulnerable part of the human body. It is equally preposterous to suggest that he did not know the consequences of hitting the deceased's head with the piece of wood with such force as described by both PW8 and PW14. He must have known the consequences of targeting the deceased's head in the manner he did.

**[40]** In any event as the authorities suggested whether the accused had subjective knowledge of the consequences of the injuries caused is irrelevant. Equally, it does not even matter that there is no knowledge on his part that the injuries of the kind suffered by the deceased carried a high probability to cause death. It is also immaterial whether the accused intended the consequences of the bodily injuries caused by him.

**[41]** Viewed objectively, the result of the intentionally caused injuries by the accused upon the deceased indeed carried a high probability to cause death. There is no doubt that it sufficient to cause death in the ordinary cause of nature. PW14 concluded the notion. It was his testimony that the head injuries of the kind suffered by the deceased could occasioned a quick death. In fact the said head injuries was the cause of the death of the deceased. The intention of the accused whether to cause death or otherwise is immaterial. Once it is established that the accused intended the injuries that is sufficient in the ordinary course of nature to course death, the act of accused is murder within the ambit of s 300(c) of the Penal Code. It does not even matter that there is no knowledge that an act of the kind committed by the accused will be likely to cause death. In the words of the learned authors, *Ratanlal & Dhirajlal* quoted earlier '… the sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensures and the causing of such injuries is intended the offence is murder …'.

**[42]** It is thus my findings that the prosecution had proved the accused's intention of murdering the deceased by the act of the accused which is well within the ambit of s 300(c) of the Penal Code. All the requirements under s 300(c) of the same were proven by the prosecution.

**[43]** In the event at the end of the prosecution's case upon a maximum evaluation of the evidence adduced thus far, it is my findings that the prosecution had made out a prima facie case against the accused on the charge proferred. Should the accused remained silent, the evidence adduced is sufficient to warrant his conviction. The accused was consequently ordered to enter his defence.

**[44]** The accused opted to testify on oath. The accused admitted that he entered the shop run by PW8. He admitted that at the material time only

PW8 and the deceased were in shop. He admitted that he came by the said Kembara car. The front part of the car was parked facing the shop. He admitted that he asked PW8's permission to use the toilet. In fact he used the toilet. He also admitted ordering a packet drink from PW8. However, his admissions ended here. The rest of the evidence as adduced by the prosecution were denied.

**[45]** The accused testified that after using the toilet he went back to the front portion of the shop and sat on a table outside the shop to continue his drink. Thereafter he wanted to pay for his drink. He found no money in his wallet. He went back to his car to take some money. He gave RM1 to PW8 to pay for the packet drink after retrieving the money from the car.

**[46]** After paying for the packet drink, he asked PW8 whether she could help him by advancing some money for him to buy petrol and pay for the toll tickets to enable him to continue with his journey to Johor Bahru. He didn't tell her how much he wanted to borrow though. The accused added that initially PW8 was agreeable but after taking the money from the drawer she appeared unwilling/unhappy. She threw the money on the table.

**[47]** After throwing the money on the table, PW8 went back inside the shop. The accused continued to say:

> … Semasa beliau patah dan masuk, dia tidak kata apa-apa tapi saya nampak perempuan tua itu bangun dan tanya SP-8 apa hal. SP-8 beritahu perempuan tua itu 'tidak ada hal! tidak ada hal! kemudian saya nampak perempuan tua itu berjalan meraba-raba dan goyang kepala dan kemudiannya jatuh. Bila nampak orang tua itu berjalan-jalan begitu saya rasa takut dan minta perempuan tua itu duduk. Saya tidak pernah nampak perempuan tua berjalan dalam keadaan begitu. Perempuan tua itu pakai cermin mata banyak tebal.
>
> Lepas jatuh saya beritahu SP-8 perempuan tua itu jatuh dan tanya sama ada hendak hantar perempuan tua itu ke hospital. Saya nampak perempuan itu jatuh. Saya ada diluar kedai dan duduk atas kerusi.
>
> Semasa perempuan tua itu jatuh tidak dengar apa-apa bunyi. Saya nampak hidungnya berdarah. SP-8 menjadi cemas dan lari keluar ke jalanraya dan menjerit rompak! rompak!
>
> Lepas perempuan tua itu jatuh, saya nampak beliau tidak mengalami sebarang luka. Saya tidak berani masuk ke dalam kedai kerana kedai bukan kepunyaan saya.
>
> Selepas perempuan tua itu jatuh, saya ada disitu tidak sampai 5 minit. SP-8 keluar ke tepi jalanraya dan menjerit-jerit untuk tahan kereta dan kata rompak! rompak!. Saya nampak pekerja-pekerja bina jalan ada yang bawa cangkul, paip besi dan menuju ke arah saya. Semua kira-kira 5 orang pekerja.
>
> Bila nampak mereka datang semakin dekat kepada saya dan dengar jeritan SP-8 – 'rompak', saya agak ada salah faham, saya terus naik kereta dan beredar dari tempat itu. Saya tidak ambil wang yang dicampakkan oleh SP-8 …

**[48]** The defence of the accused is absolutely a defence of bare denial. From the above and later under cross-examination, the accused denied:

(a) going back to his car and re-entering the shop armed with a piece of wood;

(b) hitting PW8 with a piece of wood;

(c) hitting the old woman which he later identified as the deceased on her head with a piece of wood;

(d) ransacking the drawers of the counter and later the drawers in the living room;

(e) denied taking the monies from inside the drawers of the counter; and

(f) denied robbing the deceased of her jewelleries.

**[49]** The accused further testified that he wanted to go to Batu Pahat Police Station but changed his mind when he noticed several cars pursuing him. He sped towards Yong Peng town and entered the PLUS Highway through Yong Peng Toll. Later he exited at the Air Hitam Toll to go to Air Hitam town. He saw one of the cars pursuing him waiting for him there. He made a U-turn and re entered the PLUS Highway through the same Air Hitam Toll and heading south towards Machap. Soon after re entering the PLUS Highway, his car went out of petrol and came to a stop, later identified at KM 80 PLUS Highway. He abandoned his car there and fled on foot into the surrounding kebun kepala sawit on the left side of the Highway towards Johor Bahru. He hid himself in the bushes in the kebun kelapa sawit. He kept hiding for more than two hours during which time he saw may people, all Chinese, armed with knives, sticks and shot-gun waiting for him.

**[50]** When the police came, he surrendered to one of the search teams. He told them where he was hiding. He was handcuffed to his back and made to lie on his back on the ground. He was stepped on by the police on his back in that position. The accused further testified that the police recovered more then RM100 from his right trousers pocket. He claimed the sum to be his. The said sum was kept in an angpow packet and inserted at one of the apertures of the roof of the car. He remembered this money as he was about to leave the car by the side of the PLUS Highway. He took the money along with him. When he was led out of the *kebun kelapa sawit* he again saw many Chinese people waiting for him at the edge of the *kebun* armed with sticks, knives and shot gun. He asked the police to bring the police car into the *kebun* to fetch him to ensure his safety.

**[51]** The accused testified that the said sum was about the only item recovered from him by the police at the *kebun kelapa sawit*. He denied that

A the bracelet and the two rings were recovered by PW9 from his person at the *kebun kelapa sawit*. He also denied that the four iron clippers recovered by PW12 from the floor board of his Kembara car were recovered from the car. He affirmed that he did not bring the four iron clippers with him into the car while driving the car.

B

**[52]** Such were the essence of the defence of the accused.

**[53]** At this stage it is pertinent to note that the accused did not challenged:

C (a) PW8's evidence that the general health condition of the deceased was good and that she did not suffer from any debilitating illnesses;

(b) PW8's evidence that the accused did in fact tried to hit her on her head but the blow landed on her rear left shoulder after she avoided the blow;

D (c) PW8's evidence that the accused demanded from her where her monies and jewelleries were kept;

(d) PW8's evidence that the accused ransacked the drawers of the counter and the drawers in the living room after the deceased fell on the floor after receiving the blow on her head delivered by the accused;

E

(e) PW8's evidence that the accused took the monies kept in the drawers of the counter;

(f) the identification of the four iron clippers by PW8 that the said iron clippers were the clippers she used to separate her collections according

F to its denominations;

(g) the identification of the bracelet and the two rings by PW8 as the bracelet and rings belonging to the deceased and worn by the deceased; and

G

(h) the recovery of the said bracelet and two rings by PW9 from inside the trousers pocket of the accused at the time of his arrest.

**[54]** The legal position relating to the failure by the defence to challenge or

H cross-examine such evidence amounted to acceptance of the witness's testimony on the facts deposed. The facts emanating from the testimony of PW8 on the issues above thus remains unshaken and ought to be accepted without more (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212).

I **[55]** Having scrutinised the evidence of the accused, it is my view that the defence offered by him is grossly against the weight of the evidence. I will now examine the crucial parts of his evidence.

**[56]** According to the accused, the deceased stood up, groped around, shook her head repeatedly and fell. However the uncontroverted and unchallenged testimony of PW8 pointed to the fact that the deceased, prior to her death, was a rather healthy woman. She did not suffer from any kind of debilitating illnesses. She was also able to walk on her own. The post mortem report also showed the same. Thus there is no reason for the deceased to walk in the manner described by the accused. There is also no reason assigned to account for her fall if it is true that she did in fact stood up and fell. Additionally PW8's testimony that the deceased was seated on the reclining chair prior to being struck by the accused remains largely unchallenged. The testimony that the accused stood up, groped around, shook her head and fell down was also not put to any of the prosecution witnesses, principally PW8. Thus the prosecution was thus denied the opportunity to rebut such evidence.

**[57]** The accused also claimed that he noticed that after the fall, the deceased did not suffer any injuries except for her bleeding nose. However PW14 confirmed that the deceased suffered two serious trauma impacted injuries, one on her forehead and the other at the back of her left ear. PW14 further added that the two injuries were inconsistent with those caused by a fall. Additionally PW14 also excluded the suggestion that the injuries were due to the deceased's head coming into contact with the cross-beam shown in the photographs (see reasons earlier enumerated). The accused therefore could not have been telling the truth when he testified that the deceased suffered the fall on her own and incurred a bleeding nose as a result of the fall.

**[58]** As regards to the testimony that the deceased was wearing a very thick pair of spectacles, the evidence shows none were recovered from the crime scene. If it is true that the deceased wore the said spectacles, the same must be there, somewhere around the deceased's body. It could have been easily retrieved by the investigation officer and produced in court. Neither was it suggested that the investigation officer was suppressing this piece of evidence. Equally it was not suggested to PW8 that PW8 took the spectacles to hide the evidence. Again this issue was posited for the first time by the accused in his defence. In such event in my view this claim that the deceased was wearing very thick spectacles is merely a creation of the accused in an attempt to lend credence to his testimony that the deceased stood-up and was groping around like a blind person even with her thick spectacles on. It is an attempt to show how weak and feeble the deceased was, to run in tandem with her fall, contrary to the facts deposed by PW8.

**[59]** Next the accused testified that he did not take the monies from the drawers of the counter of the shop. This issue was again raised for the first time in his defence. However PW8's evidence was very emphatic that the

accused ransacked the drawers of the counter after hitting her and hitting the deceased on her head. She saw the accused scooping the monies kept in the drawer and the monies were separated by clipping the monies with iron clippers in accordance with its denominations. These evidence were not challenged by the defence. The recovery of the four iron-clippers from the floor board of the accused's Kembara car by PW12 and the subsequent identification of the four iron clippers by PW8 are very cogent evidence supporting/corroborating PW8's testimony relating to the events leading to the death of the deceased. By his own account, he was alone at all times. He was alone when he entered the shop and exited the shop. He was also alone at all times driving the car, at the time of abandoning the car, during the times hiding in the *kebun kelapa sawit* and at the time of his arrest. There was no evidence nor suggestions that the four iron clippers were planted on the floor board of the Kembara car by the investigation officer or other interested parties. In such event the only irresistible inference to account for the presence and subsequent recovery of the four iron clippers from the floor board of his Kembara car is that the accused must have taken the monies from the drawers of the shop's counter together with the four iron clippers used to clipped the monies in accordance with its demoninations as testified by PW8.

**[60]** The accused's testimony that more than RM100 recovered by PW9 upon his arrest at the *kebun kelapa sawit* was his and was kept inside an ang pow envelope and inserted at one of the apertures of the roof of his car before he took it along with him grossly runs counter with his earlier testimony that he had asked for a loan from PW8 to enable him to continue with his journey to Johor Bahru. In my view the evidence in respect of the two matters are plainly incredible. PW8 is a total stranger to the accused. We don't simply ask a total stranger for a loan. It also makes no sense for the accused to ask for a loan without stipulating the amount. Equally it makes no complete sense for PW8 to initially agree to give the loan but moments later becoming unhappy/unwilling about it for no apparent reason. Again it begs the question why would the accused asked for the loan when he had more than RM100 at all times safely tucked some where at the roof of his car. By his own account he was running for his life the moment PW8 ran out of her shop shouting for help right to the moment he abandoned his car. Yet at such critical times he suddenly remembered his more than RM100 tucked somewhere at the roof of his car. Indeed the accused's testimony is simply incredulous bordering on fiction. PW8's testimony that the accused demanded from her where her money was after hitting her with a piece of wood stood uncontroverted till the end. The issue of the accused asking for a loan was never put to her.

**[61]** The accused also claimed that he did not bring any piece of wood into the shop from the moment he entered the shop to the time he exited the shop. However PW8 testified that she saw the accused arming himself with a piece of wood upon re entering the shop and was really close to him before she was hit by the accused with the said piece of wood. She also gave a description of the wood — length, thickness and colour of the wood. Otherwise than its thickness, the piece of wood used by the accused was similar with the one exhibited in court — exh P20A. Exhibit P20A is squarish in shape with defined edges. She also said that the accused threw the said piece of wood outside his shop. PW6 also said that the accused threw something on the ground after emerging from the shop but could not make out what it was. PW8 also mentioned the piece of wood being used by the accused in her police report — exh P31. Her testimony that the accused hit her by using a piece of wood was not challenged by the defence. She was not cross-examined over the same. The failure of the defence to do so goes to the credibility of her testimony, ie the fact that she was hit by the accused by using a piece of wood remains unshaken. It ought to be accepted and I have no hesitation in so accepting upon the totality of the evidence. The corollary to the same is the ultimate findings, that the accused had indeed armed himself with a piece of wood upon re entering the shop for the second time. Additional support for the said findings can be gathered from the injuries sustained by the deceased which, as said earlier, were consistent with that caused by a piece of wood. Hence it does not matter that the said piece of wood was not recovered by the police in the light of PW8's evidence and the nature of injuries which were consistent with that caused by a piece of wood.

**[62]** Equally the accused's testimony that he did not re enter the shop after witnessing the deceased falling down on the floor is not supported by his own evidence. The fact shows that the deceased fell in the living room away from the business area. This fact was not disputed by the accused. And the accused said that the only injury he saw on the deceased was her bleeding nose. Now how could the accused possibly noticed the same if he was outside the shop and did not re enter the shop and go to the living room to where the deceased was lying? Evidently the accused was simply lying through his teeth.

**[63]** The accused further testified that soon after PW8 ran out of the shop and shouted rompak! rompak!, he saw several people, about five of them, all construction workers involved in the construction and upgrading works of the rood nearby, coming after him. All were armed, either with iron-pipes or cangkuls. Sensing that they must have misunderstood the situation and were coming after him, he became very frightened. He jumped into his car and fled towards Batu Pahat.

A **[64]** However, in my view the assertion of the accused is not supported by any other evidence. PW8 is a simple, typical kampung folk and well composed in her testimony. In my observation, she is a truthful witness, incapable of exaggeration. PW6 and his friend were about the only person she met and who came to her aid. She makes no reference about construction B workers coming to her aid or going after the accused. She was not cross-examined on the matter either. Equally PW6 did not mention anything about the construction workers. He was also not cross-examined on the issue. Thus I have no hesitation in accepting the testimonies of both PW8 and PW6 in respect of the same, ie that PW6 and his friend were about the only C persons who came to her aid and who would later mounted a chase against the accused. Additionally the conduct of the accused obviously belies his innocence from the very beginning. There is no need nor justification at all for him to flee the scene if he is innocent of any wrong doing. He went at great lengths to make his escape. His conduct in not an insignificant way D merely strengthened the prosecution's case against him.

**[65]** The accused's testimony that there were many Chinese men waiting for him or looking for him by the roadside at the edge of or inside the *kebun* E *kelapa sawit* where he was hiding is also to be similarly treated. PW9 and his team were there taking out the accused from the *kebun kelapa sawit*. PW9 makes no reference about Chinese men waiting by the roadside. He was also not cross-examined on the issue by the defence. DW2, a member of PW9's team who effected the arrest of the accused also makes no mention of a group F of Chinese men waiting for the accused or looking after the accused inside the *kebun kelapa sawit*. Neither was the investigation officer cross-examined over the issue. Hence in my view this piece of evidence is of no evidentiary value at all. It was plucked from thin air and raised for the first time during the defence, designed to impressed the justification upon which the accused G account for his conduct, ie running away from the crime scene and hiding inside the *kebun kelapa sawit* though innocent of any wrong doing.

**[66]** The defence of the accused as enumerated and examined above is clearly wanting in credibility. It is just incapable of being believed. It is also H merely a defence of bare denial and grossly against the weight of evidence.

**[67]** Additionally the crux of the defence was sprung for the first time by the accused only in his defence as enumerated below at the risk of being I repetitive, thus denying the prosecution the opportunity to offer rebuttal evidence or explanation through its witness or verify or check its truthfulness/correctness:

(a) He (accused) found no money in his wallet when he wanted to pay for his packet drink, prompted him to go back to his car to take the money.

(b) He asked for a loan from PW8 to enable him to buy petrol for his car and pay for the toll tickets for him to continue with his journey to Johor Bahru.

(c) PW8 took some money from the drawers of the counter and threw the money on the table.

(d) PW8 went back inside the shop after throwing the money.

(e) As PW8 was re-entering the shop, the deceased enquired what had happened.

(f) He saw the deceased getting up, groped around, shaking her head repeatedly and fell.

(g) Upon seeing the deceased in such condition, he took fright and asked the deceased to sit down.

(h) He saw the deceased wearing very thick spectacles.

(i) He told PW8 that the deceased had fallen and asked whether she would want the deceased to be sent to hospital.

(j) He was outside the shop, seated on a chair at the time he saw the deceased falling down.

(k) He was at the shop for less than five minutes after the deceased fell.

(l) After five minutes PW8 ran out of the shop, shouting rompak! rompak! and stopped a passing car.

(m) PW8 did so because she was panic-stricken.

(n) He saw about five construction workers armed with iron-pipes and changkuls coming towards him.

(o) He did not bring along with him any piece of wood from the time he entered the shop to the time he left the shop.

(p) He went hiding inside the *kebun kelapa sawit* and saw many Chinese men armed with sticks, knives and shot gun.

(q) He surrendered himself upon seeing the police in the *kebun kelapa sawit*.

(r) The police stepped upon him when he was asked by the police to lie on his back.

(s) He asked the police to protect him when he was taken out of the *kebun kelapa sawit* to the roadside.

(t) At Balai Polis Air Hitam he was forced by the police to sign certain documents when both his hands were handcuffed to the back.

A (u) The money recovered by PW9 at the *kebun kelapa sawit* were his and was earlier kept in an ang pow envelope, tucked somewhere at the roof of his Kembara car.

B **[68]** These issues formed the backbone of the accused's defence. Nevertheless it was never put to the prosecution witnesses nor challenged through the said witnesses. In such event, I am with the prosecution's submission that such failure would render the same to be liken or branded as a recent invention incapable of being accorded the due weight it deserves. *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 1 CLJ 285 C (Rep) is on point. Per Edger Joseph SCJ:

> The trial judge appreciated correct law when he held, as he did in fact hold, that the defence are entitled, through cross-examination of prosecution witnesses to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we D need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or dock, so that the prosecution is taken by suprise the accused runs the risk of being criticised for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

E **[69]** *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 is equally on all fours.

**[70]** The next witness for the accused was DW2. He was a member of F PW9's team in the search operation at the *kebun kelapa sawit*. He was with PW9 when the accused was arrested and searched by PW9. His testimony more or less confirmed the narratives and the recovery of the exhibits by PW9. His testimony in essence strengthened the prosecution's case. His testimony is of no evidenciary value in so far as the accused's defence is G concerned.

**[71]** DW3, a neuro surgeon attached to a certain specialist centre in Malacca came to court, took a look at the post mortem report and proceeded quickly to declare loudly that the deceased died due to lung congestions and H not due to head injuries as opined by PW14. He was emphatic that looking at the post mortem report, there was no evidence that the deceased had suffered brain injuries that could occasioned her death. Nevertheless he conceded that the congestions of deceased's lungs were complications resulting from head injuries suffered by the deceased.

I **[72]** Nevertheless he opined that the deceased's lungs and passage leading to the lungs were filled with aspirated fluid from the stomach as well as trauma to the lungs and that it was possible that the patient could have drown from the aspirated contents of the stomach and death could happen.

**[73]** DW3 ventured to add that it is likely the patient has fainted at the fall and the aspirated stomach contents surged into her lungs which is likely to be the immediate cause of death. To a question: **A**

Q: If congestion of the lungs does not arise, what could have been the possible cause of death? **B**

A: In isolated subarachnoid haemorrhages, the patient is likely to have survived or could have died of other complications later on.

**[74]** However DW3 is not a pathologist but a consultant neuro surgeon. He did not examined the deceased and the nature of the injuries suffered by the deceased. He admitted that his opinion as regards to the cause of death of the deceased was merely based upon the reading of the post mortem report. He readily agreed that the best person to testify as regards to the injuries and the cause of death would be the pathologist who conducted the post mortem examination on the deceased. **C** **D**

**[75]** Notwithstanding the above, having scrutinised the testimony of DW3, I am of the view that his opinion as enumerated above clearly lacks comprehensiveness and depth. This can be gathered from his admission that aspiration of gastric contents is a common feature in many injuries and that aspiration of gastric contents might be due to complications because of head injuries. He also failed to take into account the effect of the head injuries suffered by the deceased. According to him he did not take this factor into account because the post mortem report did not show that the deceased also incurred brain injuries. **E** **F**

**[76]** However the post mortem report does indicate that the deceased also suffered brain injuries. Additionally PW14 gave a comprehensive, graphic details of the brain injuries suffered by the deceased (see PW14's evidence during examination in chief). These details were not referred to DW3. Here comes the danger of testifying based upon the cold print of the post mortem report without actually examining the dead body. I think the problem with DW3 is this — he did not have the benefit of examining and seeing for himself the actual nature of the brain injuries suffered by the deceased. Equally he did not have the advantage of having full access of PW14's detailed findings. Evidently DW3 did not equip himself enough to carry out the ardous task of determining the cause of death of the deceased. **G** **H**

**[77]** It is also my view that DW3's opinion as to the cause of death of the deceased was made in isolation without regard to other factors or findings. He gave a single factor for the cause of death ie due to lung congestions. He did not take into account all other injuries suffered by the deceased which could have caused the death of the deceased. In contrast, PW14 said '… sebelum **I**

A saya formulate sebab-sebab kematian, saya telah mengambilkira penemuan lain kesemua bahagian dalaman si mati …'

**[78]** Both PW14 and DW3 agreed on one point though, ie that the congestions of the lungs could be due to complications because of the head B injuries. However, PW14 thoroughly excluded that the said congestions were the cause of the death of the deceased. During his cross-examination, he reasoned (at p 87 of the notes of evidence):

> C Page 2 – P38 — on chest regurgitant — adalah makanan yang ada dari perut yang telah masuk ke kawasan oesophagus kerana sphincter perut (otot/opening) yang mengawal kemasukkan makanan tidak lagi berfungsi. Tidak berfungsi kerana orang itu telah mati.
>
> D The trachea and its air passages showed aspiration of gastric contents until the bronchi — isi perut masuk dalam saluran pernafasan. Aspiration ini menyebabkan pendarahan kecil dalam paru-paru yang menyebabkan saluran pernafasan tertutup dan tidak dapat bernafas.
>
> Q: Explanation dalam para ini adalah salah satu cause of death?
>
> E A: Tidak. Ia merupakan komplikasi kerana kecederaan otak. Berlaku sekitar kematian atau selepas kematian.

**[79]** PW14 conducted the post mortem on the deceased. He saw and examined her lungs and positively concluded that the said F congestions/aspirations occurred at the time of death or after death had taken place and that the said congestions/aspirations were not the cause of death of the deceased. Being the person who conducted the post mortem, being the pathologist with years of experience, being the person who personally examined the lungs and the brain of the deceased and having dissected more G than 1000 dead bodies in the course of his work as a pathologist, I have no hesitation to prefer and accept his testimony over the evidence given by DW3. Equally PW14 in his evidence in chief has enumerated in great detail his findings regarding the nature of the head injuries suffered by the deceased. I have said enough of the same in earlier paragraphs and I have no wish to H repeat it here. Nevertheless at the end of his post mortem, PW14 concluded that the deceased died due to the brain injuries she had suffered, which he commonly referred to as 'head injuries'. Again I have no hesitation in accepting his findings on the same grounds given earlier.

I **[80]** Learned counsel for the defence took issue over the contradiction between the evidence of PW8 on the one hand and PW14 and DW3 on the other, in respect of the position of the deceased at the time she was hit by the accused. PW8 said that the deceased was then sitting in a reclining position on the reclining chair whereas both PW14 and DW3 opined that the

deceased was in a standing position at the time of receiving the blows. Both doctors based their opinions on the blood drops scattered around as shown in the photographs P22 (5, 6, 7, 8, 9). PW14 opined that the distribution of the blood drops indicated that she was in a standing position at the time she was hit.

**[81]** However PW8 was there at the scene. She saw the incident. She was at point 'X' in photograph exh P25 (5) (which she drew herself) when she (PW8) was hit by the accused. Thereafter the accused went after the deceased. She was very near to the deceased when the deceased was hit. She saw how and where the deceased was hit by the accused. She was able to demonstrate how the accused struck the deceased. She saw the deceased sliding down after being struck. She was emphatic that the deceased was seated when she was struck. Being an eye-witness and the consistency of the testimony of the eye-witness, which I have ruled to be a truthful witness, I have no reason cogent enough to disregard her version of the event in preference of the testimonies of the two doctors which in any event is a theorem based merely upon the distribution of the blood drops.

**[82]** I am fortified in my preference by the following passage by His Lordship Jeffrey Tan JC (as he then was) in *Public Prosecutor v Lee Poh Chye & Anor* [1997] 4 MLJ 578:

> It must be said that much as 'it is improper to ask a physician how certain wounds or injuries were actually given, as this would be trespassing upon the province of the jury' (*Sarkar on Evidence* at p 798), it is also improper to accept a physician's opinion on how injuries were caused, unless the opinion is on the kinds of weapon used as a result of which wounds of a given description might be caused, or whether wounds of a given character were caused before or after death if it is convincing and satisfactory (Sarkar on Evidence at p 800). *According to the learned authors of Sarkar on Evidence, 'a doctor's evidence must be appreciated like the evidence of any other witnesses' and 'to rely upon the medical evidence as decisive is to render the other evidence entirely fruitless'; and 'when there is overwhelming evidence of eyewitnesses the medical evidence which is contrary to that of eyewitnesses can be disregarded', and 'if the medical evidence is obscure and oscillating it is not proper to discredit the direct evidence of witnesses', and 'when there are alleged eyewitnesses of physical violence said to have caused death the value of medical evidence is only corroborative', and 'a judge is not entitled to discard the direct evidence of credible and unimpeachable witnesses deposing to things observed with their own eyes merely upon the opinion of a medical witness that those things could not have been done*'. (Emphasis added.)

**[83]** The same pattern of distribution of the blood drops could not be ruled out if one were to be hit while in a sitting position. The reason being the blood could have spurted and eventually distributed in any direction upon being similarly hit. That being said, it does not really matter whether the

A deceased was struck while in a standing or sitting position. The consequences of the assault is still the same. It only goes into the credibility of PW8 and I am satisfied that PW8's credibility is beyond reproach till the end.

B **[84]** Learned counsel for the accused submitted that PW14 saw and conducted the post mortem only on 25 February 2004, two days after the death of the deceased. He obtained the date and time of death (23 February 2004, 11.40am) from the investigation officer and the notes from the relevant file of the deceased at Batu Pahat Hospital. The medical officer who initially saw the deceased and made the said notation on the file was not called to C testify. Neither was the said file brought to court. PW14 could not bring the file along as he is no longer serving at Hospital Sultanah Aminah Johor Bahru. He is now with Hospital Sungai Buloh, Selangor, as the Pakar Forensik Pathologist. He could no longer remember the doctor who first attended the deceased as the file is not with him. In such event, learned D counsel submitted that the prosecution had failed to prove the time or probable time of death of the deceased. He submitted *Pendakwa Raya v Kong Yik Lin* [2005] 5 AMR 606 which quoted other cases as well to support his contention.

E

**[85]** However I am of the view that the said authority is wholly out of place. It talks about the weaknesses of the administration of the hospital system in Perak and talks about the scenario which was altogether different with what I have before me. Here the body of the deceased was still intact and F was not in any state of decomposition. In this case before me there is direct evidence relating to the time or probable time of death of the deceased. The death of the deceased was immediately discovered by PW8 very soon after the incident. PW8 said that the accused came to her shop at 11.15am. He was there for about 20 minutes after which he went out to his car only to re enter G the shop armed with the piece of wood. This time he was in the shop for about 10 minutes before he fled after hitting her (PW8), hitting the deceased on the head and ransacking the drawers of the counter and the drawers in the living room. When she (PW8) came back into the shop after accused left, she found the deceased motionless. Her attempts to wake her up failed. She H found the deceased to be pretty dead. The deceased was struck minutes before she (PW8) left the shop. When she came back not long after, she found the deceased motionless; pretty dead. This is consistent with PW14's evidence that brain injuries of the kind suffered by the deceased could cause death to take place quickly. The investigation officer (PW12) who arrived at the scene I at about 1pm the same day found the deceased to be dead already. He was informed of the deceased's death by PW8. He took the deceased body to Batu Pahat Hospital for a post mortem. On the day the post mortem was conducted he was present. He told PW14 the time of death of the deceased. PW14 checked with the hospital records and noted the time of death as at

11.40am on 27 February 2004. This is consistent with PW8's testimony that the accused was in her shop for a total of 30 minutes (20 minutes and 10 minutes) and thereafter discovered the deceased motionless. Since then, the deceased was not seen alive. The Batu Pahat Hospital confirmed her time of death at 11.40am. This information must have come from the investigation officer who is competent enough to say whether one is dead or is still alive. Therefore, in my view there is direct evidence which is sufficient enough to determine the time or probable time of death of the deceased. The time of death of the deceased given and adduced in evidence is consistent with the testimony of PW8 and consistent with the duration of the accused's presence in the shop and the time he delivered the blows upon the deceased's head. It is a non-issue altogether. Here there were eye-witnesses who were able to give the estimated/probable time of death of the deceased. It would have been different if there were no eye-witnesses and the dead body was discovered a week or so after death had taken place and the body was already highly decomposed. In such cases the time of death or probable time of death is vital. It must be proved.

**[86]** Having considered the evidence in its entirety I am wholly satisfied that the defence posited by the accused is a defence of mere denial. It is insufficient to dislodge the prosecution's case. It has not created any reasonable doubt in the prosecution's case (*Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324); *Bala anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 1 LNS 8). The prosecution, on the contrary, had proved the offence against the accused beyond a reasonable doubt. There is no doubt whatsoever that the accused murdered the deceased, Lim Toh Eng. The accused is thus found guilty and convicted of the offence as proffered. Accordingly he is sentenced to hang by rope by his neck until he is dead.

*Accused convicted and sentenced to death.*

Reported by Mashrifah Ravendran